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No. 07-___

IN THE

Supreme Court of the United States

MANUEL A. VEGA-SANTIAGO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the same question at issue in *Irizarry v. United States*, 458 F.3d 1208 (11th Cir. 2006), *cert. granted*, 128 U.S. 828 (Jan. 4, 2008) (No. 06-7517) (oral argument held Apr. 15, 2008):

Whether a district court must provide a criminal defendant notice of the contemplated grounds for a sentence above the range recommended by the Sentencing Guidelines.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Manuel A. Vega-Santiago respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. A) is reported at 519 F.3d 1 (1st Cir. 2008). The opinion of a panel of the court of appeals (App. B) is reported at 519 F.3d 14 (1st Cir. 2007).

JURISDICTION

The panel of the court of appeals entered its judgment on October 31, 2007. Following rehearing en banc, the court of appeals entered its judgment on February 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 32(h) provides in relevant part:

> Notice of Possible Departure From Sentencing Guidelines.
>
> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. P. 32(h).

STATEMENT OF THE CASE

1. Following a jury trial, petitioner was convicted on several counts, including one count of robbery, in violation of 18 U.S.C. § 2119(1). At sentencing the government announced, for the first time, that it was seeking the statutory maximum sentence of 15 years (180 months) on that count, roughly three times the otherwise applicable guideline imprisonment range of 57 to 71 months calculated in the PSR. App., *infra*, at 35a-36a. Citing Rule 32(h) of the Federal Rules of Criminal Procedure, defense counsel argued that because neither the PSR nor a prehearing submission by the parties had proposed a non-guideline sentence, the court was required to provide reasonable notice before entering a sentence outside the guideline range. *Id.* at 36a. The court disagreed, holding that "Rule 32(h) applies only to formal 'departures,' which are based on specific provisions of the advisory Guidelines, and not to 'variances' from the Guidelines based on the sentencing criteria set out in 18 U.S.C. § 3553(a)." *Id.* at 37a. The district court imposed a sentence of 120 months on the robbery count—more than four years longer than the maximum sentence contemplated under the guidelines. *Id.* at 38a.

2. Mr. Vega-Santiago appealed his conviction and sentence on several grounds, including the lack of notice under Rule 32(h). A panel of the court of appeals affirmed in relevant part. Noting that other circuits had divided on the question, the panel held that "the notice requirement [of Rule 32(h)] survives *Booker* [*v. United States*, 543 U.S. 220 (2005),] and applies to any non-Guidelines sentence—whether imposed as a departure or as a variance." App. at 53a. The panel nonetheless held that no error had

occurred because Mr. Vega-Santiago had received "reasonable notice" during the sentencing hearing. *Id.* at 61a-63a.

3. The court of appeals *sua sponte* voted to rehear the case en banc, limited to the notice issue. App. at 2a; *id.* at 13a (Tourella, J., dissenting). By a vote of 3-2, the court of appeals vacated the panel opinion in part and held that reasonable notice was not required under these circumstances.

a. In an opinion by Chief Judge Boudin, the court rejected the approach of every other court to consider the question and held that "notice is sometimes, but not always, required." *Id.* at 3a. Rather than adopt a "mechanical rule" as to the application of Rule 32(h) to non-guideline sentences based on the Section 3553(a) factors, the majority held that "when proposing to adopt a variant sentence relying on some ground or factor that would *unfairly surprise* competent and reasonably prepared counsel, a judge must either provide advance notice or, on request, grant a continuance in order to accommodate a reasonable desire for more evidence or further research." *Id.* at 9a (emphasis in original). Applying that flexible standard to the facts of this case, the majority held that no notice was required. *Id.* at 9a-10a.

b. Judges Lipez and Tourella dissented. Judge Lipez wrote that "[t]he majority's rejection of a reasonable notice requirement in favor of a new standard" based on unfair surprise "leaves district court judges without the very guidance the majority purports to offer them." *Id.* at 16a (Lipez, J., dissenting). Accepting the argument advanced by both the government and Mr. Vega-Santiago, he concluded

that reasonable notice is required for all non-guideline sentences "to ensure full adversarial testing of the issues related to sentencing." *Id.* Further, he explained that "having further considered the issue in the context of en banc briefing and argument," he had "become convinced that the reasonable notice requirement means notice of a possible variance being contemplated by the judge in *advance* of the sentencing hearing." *Id.* (emphasis in original). Because Mr. Vega-Santiago had not received prehearing notice of the contemplated above-guideline sentence, Judge Lipez concluded that the district court had erred.

He also concluded that, under the circumstances, the error was prejudicial. At the en banc court's invitation, Mr. Vega-Santiago "offer[ed] several arguments that could have been made at the sentencing hearing if counsel had received advance notice that the court was contemplating a variance based on the specific details of the offense." *Id.* at 22a. Those arguments, in Judge Lipez's view, "directly challenge the need for a non-Guidelines sentence to meet the court's objectives" and "are neither frivolous nor tangential to the court's reasoning." *Id.* at 23a. Accordingly, the error could not be discounted as harmless: "It is precisely this sort of developed presentation by counsel, reinforced by legal and factual references, that is denied a defendant who is not given advance notice of the court's contemplated grounds for a non-Guidelines sentence." *Id.* at 24a.

REASONS FOR GRANTING THE WRIT

The Petition Should Be Granted, The Judgment Of The Court Of Appeals Vacated, And The Case Remanded In Light Of *Irizarry*

This case presents the same question at issue in *Irizarry v. United States*, 458 F.3d 1208, 1212 (11th Cir. 2006), *cert. granted*, 128 U.S. 828 (Jan. 4, 2008) (No. 06-7517). The court of appeals recognized that this Court "is now likely to decide the issue" and that its opinion would be binding on district courts only "until it does" in *Irizarry*. *Id.* at 3a (citing *Irizarry*, 458 F.3d at 1212). Indeed, the briefs of the petitioner, the government, and Court-appointed amicus curiae in *Irizarry* explicitly relied on the various opinions of the court of appeals in this case. Gov't Br. 32, 35-36; Amicus Br. 20, 32, 37, 38; Reply Br. 3, 9, 12, *Irizarry v. United States*, No. 06-7517. At oral argument in *Irizarry*, Chief Justice Roberts specifically asked counsel to address the reasoning of the court of appeals in this case. Oral Arg. Tr. 15 (Apr. 15, 2008), *Irizarry v. United States*, No. 06-7517.

None of the parties in *Irizarry* embraced the novel approach of the First Circuit whereby notice is sometimes, but not always, required. App. at 3a. This Court's decision will soon resolve that question and provide guidance to the court of appeals. Proper resolution of the issue is crucial to the outcome of this case because, under the circumstances, the error was not harmless. As explained in Judge Lipez's dissent, the only opinion to consider whether the error was prejudicial, Mr. Vega-Santiago has "directly challenge[d] the need for a non-Guidelines sentence" by presenting additional arguments and evidence that "are neither frivolous nor tangential to the

court's reasoning." *Id.* at 23a (Lipez, J., dissenting). Accordingly, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 21, 2008

APPENDIX

APPENDIX A

COURT OF APPEALS EN BANC OPINION

United States Court of Appeals
For the First Circuit

UNITED STATES OF AMERICA,
Appellee,
v.
MANUEL A. VEGA-SANTIAGO,
Defendant, Appellant.

No. 06-1558.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. José A. Fusté, U.S. District Judge]

Before BOUDIN, Chief Judge, TORRUELLA, LYNCH, LIPEZ and HOWARD, Circuit Judges.

Feb. 21, 2008

OPINION EN BANC

BOUDIN, Chief Judge.

Manuel Vega-Santiago appealed from his conviction on one count of armed carjacking, 18 U.S.C. § 2119(1) (2000), and two counts of related weapons offenses, *id.* §§ 924(c)(1)(A), 922(k), asserting various trial errors. He also appealed from his prison sentence of 240 months, which represented an upward variance from the sentencing guidelines range of 177 to 191 months that would otherwise have applied to him.

A panel of this court affirmed Vega's conviction and sentence, remanding only to correct a discrepancy between the written and oral judgments. *United States v. Vega-Santiago,* 519 F.3d 14 (1st Cir. 2007). We granted rehearing en banc to consider the panel's ruling that the district judge must provide "notice" to litigants before imposing a sentence outside the guideline range—a requirement that the panel found satisfied in this case.

The facts in detail can be found in the panel opinion. *Vega-Santiago,* 519 F.3d at 18-20. Pertinently, here the district judge chose pursuant to the sentencing regime established by the Supreme Court, *United States v. Booker,* 543 U.S. 220 (2005); *see also United States v. Jimenez-Beltre,* 440 F.3d 514 (1st Cir. 2006) (en banc)—to impose a sentence above the range applicable under the sentencing guidelines. He did so after weighing the sentencing factors outlined in 18 U.S.C. § 3553(a)—in particular, the nature of the offense and the background of the offender. Neither the presentence report nor the government's pre-hearing submissions had suggested varying from the guidelines.

The question before us is whether a district court, before *sua sponte* imposing a sentence outside the recommended guideline range, must automatically provide advance notice to the parties of its intent to do so and its contemplated reasoning. The circuit courts being divided,[1] the Supreme Court is now likely to decide the issue, *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006), *cert. granted*, 128 S. Ct. 828 (2008) (No. 06-7517), but until it does, district judges in this circuit are entitled to guidance on an issue potentially present in every sentencing. Our answer is that notice is sometimes, but not always, required.

Much of the dispute among our sister circuits has concerned the applicability of Federal Rule of Criminal Procedure 32(h). The rule provides that:

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[1] Five circuits have held that notice is required. *United States v. Anati*, 457 F.3d 233, 237 (2d Cir. 2006); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006); *United States v. Evans-Martinez*, 448 F.3d 1163, 1164 (9th Cir. 2006); *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007).

Four have concluded to the contrary. *United States v. Vampire Nation*, 451 F.3d 189, 195 (3d Cir. 2006); *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), *petition for cert. filed*, 75 U.S.L.W. 3585 (Apr. 18, 2007) (No. 06-1381); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006), *cert. granted*, 128 S. Ct. 828 (2008) (No. 06-7517); *see also United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006) (holding notice no longer required even for traditional departures).

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Prior to *Booker*, the guidelines were mandatory save for "departures" that could be allowed by the district judge only in accordance with rules imposed both by the governing statute and the guidelines themselves. The term "departures" refers specifically to just such deviations. Rule 32(h) speaks explicitly of "departures," a term with a precise legal meaning. U.S.S.G. § 1B1.1 cmt. n. 1(E) (2007); *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989). Departures continue to be available after *Booker* and it is to them that Rule 32(h) is addressed.

Booker has created new latitude for district judges by permitting them to treat the guidelines as advisory and, after calculating the guideline sentence (including any departure), to impose a different sentence based on the broader criteria identified in the statute. Such deviations have been variously labeled-"variance" is one common term-but they are not "departures" either in technical terminology or in common parlance. On its face, Rule 32(h) cannot apply of its own force to variances, a distinct concept developed after the rule was promulgated.

It is far from clear whether the drafters of the rule would have included variances within the rule if they had then existed, but it does not matter: a formal rule can be changed through the statutorily prescribed rulemaking process, which includes congressional oversight of proposed changes, but it cannot be rewritten *ad hoc* by an individual judge or panel. "[A] legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). So, too, with formally adopted rules.

The more difficult question is whether the reasoning that prompted *Burns v. United States,* 501 U.S. 129 (1991)—the decision that Rule 32(h) codified—should be extended without qualification to this new context to establish a *judicially* created rule requiring automatic advance notice for variances. The Supreme Court could, and might in the end, choose to do so. But this would be an expansion of *Burns'* holding, which was specifically directed to departures.[2]

The Court in *Burns* held that courts may not depart from the guidelines if neither the presentence report nor the pre-hearing submissions of the parties

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[2] The government, which has an obvious interest in obtaining notice of contemplated *downward* variances, has reversed the position it took before the panel and now insists that Rule 32(h) does apply. But it imbues the notice requirement with such flexibility as to whether and when notice must be given that its position is ultimately quite different from Vega's.

had requested such a departure, unless reasonable notice is provided. That requirement was said to be implicit in the demands of a federal rule giving parties the right to comment on "matters relating to the appropriate sentence."[3] Without notice, the Court reasoned, counsel will be unprepared to comment meaningfully on grounds for departure proposed by the judge, resulting in a lack of adversarial testing. *Burns,* 501 U.S. at 135.

There are competing arguments as to whether and how far *Burns* and its rationales bear on variances; and the Supreme Court will answer those questions in due course. But our view is that, in this different context, adopting a mechanical rule would be a mistake: it would not respond to the realities of a system in which judges are afforded much broader discretion than in the recent past, it would reinforce guideline sentencing, and it would considerably complicate and prolong the sentencing process.

A bright-line advance notice requirement for potential departures fit sensibly within the mandatory guideline regime in place when *Burns* was decided. The guidelines provided for departures, and articulated specific grounds upon which they can (and cannot) be premised. *E.g.,* U.S.S.G. §§ 4A1.3, 5K1.1 through 2.23. Although in theory the possible grounds for departure were unbounded, in practice

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[3] This rule remains in force, Fed. R. Crim. P. 32(i)(I)(C), but reflects only a general policy on the right to comment and does not specify at all whether and when notice of anything must be given.

they functioned almost as a set of auxiliary guidelines. *See Koon v. United States*, 518 U.S. 81, 95-96 (1996) ("The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'").

Thus, departures presented a finite number of specific, discrete (and often binary) determinations that would govern departures and thus the ultimate sentence. It made sense to advise the parties in advance of any proposed departure so as allow them to dispute the facts critical to the departure and to assist the court on pertinent legal questions.[4] The premised facts were reviewable for clear error; the legal rulings, fully reviewable. 18 U.S.C. § 3742(e). In short, departures looked much like the customary fare of adversarial litigation.

Under *Booker*, *Rita v. United States*, 127 S. Ct. 2456 (2007), and now *Gall v. United States*, 128 S. Ct. 586 (2007), the sentencing inquiry, after calculating the guideline range, is far more broad, open-ended and discretionary. Under *Booker*, the district court must independently consider the statutory sentencing factors, 18 U.S.C. § 3553(a), which are phrased in very general terms (*e.g.*, "the nature and circumstances of the offense"; the need for the

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[4] Departures often required the judge to analyze not only the guidelines, but also the policy statements of the Commission (which were binding, *Stinson v. United States*, 508 U.S. 36 (1993)), and the circuit law relating to appropriate and inappropriate grounds.

sentence "to reflect the seriousness of the offense"). A variant sentence may then be imposed based on a complex of factors whose interplay and precise weight cannot even be precisely described.

The district judge draws on information from the trial, the pre-sentence report and the parties' commentary, the defendant's allocution, victims' statements, letters, its own review of these materials before the sentencing hearing and whatever is added during the hearing. Throughout the hearing, the judge may well be revising his views depending on what is presented and how counsel respond to questions. This is a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds.

Yet in order to provide advance notice of any value, a district court would have to advise not only that a variance is possible but also the ground and reasoning behind it *before* he has even heard the full presentation. This is very different than the identification in advance of a particular ground of departure that may or may not be invoked. "[R]equiring advance notice of 'any ground' . . . would undoubtedly prove to be unworkable." *United States v. Vampire Nation,* 451 F.3d 189, 197 (3d Cir. 2006).

Further, a mechanical requirement of such notice is unnecessary. In the normal case a competent lawyer—and for incompetence other remedies are available—will anticipate most of what might occur at the sentencing hearing—based on the trial, the pre-sentence report, the exchanges of the parties concerning the report, and the preparation of

mitigation evidence. Garden variety considerations of culpability, criminal history, likelihood of re-offense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing.

Were a mechanical notice rule imposed, some judges would shy away from imposing non-guideline sentences that the parties had not proposed in advance, increasing the "gravitational pull" of the guidelines, *United States v. Trujillo-Terrazas*, 405 F.3d 814, 819 (10th Cir. 2005), and compromising the greater freedom sought by *Booker* and *Rita*. *See, e.g., Rita*, 127 S. Ct. at 2465 (holding that a district judge "does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"). Alternatively, the judge would often have to employ a burdensome two-stage regime, explaining at the end of the first hearing his proposed sentence and then conducting a follow-up hearing based on such notice.

The preferable solution is thus not a mechanical rule mandating formal notice in every case where the judge may conceivably vary from the guidelines. Rather, when proposing to adopt a variant sentence relying on some ground or factor that would *unfairly surprise* competent and reasonably prepared counsel, a judge must either provide advance notice or, on request, grant a continuance in order to accommodate a reasonable desire for more evidence or further research. No formal rule is required for us to adopt such a prudential policy as a matter of precedent.

In practice such cases of unfair surprise, probably rare, are not that hard to identify; and this case is not

one of them. Here, the district judge relied primarily on three particular details of the crime—that it involved the invasion of a home, death threats and a near-miss firing of a gun—and that Vega had been previously arrested (but not convicted) on charges of violent crime. The details of the crime were well known to counsel; and Vega had admitted his prior "brushes with the law" which were noted in the pre-sentence report.[5]

Defense counsel may not have anticipated that the district judge would rely upon *those* particular facts to impose an above-guideline sentence, but having that knowledge in advance would not have made any obvious difference. The facts themselves were familiar and undisputed, so there is no concern here that counsel might have been able, with notice, to challenge them. And nowhere else in the law is the judge required to explain his reasoning *before* counsel have argued to him.

In granting rehearing en banc we invited supplemental briefing not only on the panel's automatic notice requirement but on whether there was unfair surprise in this case. Defense counsel have added new arguments to those earlier presented

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[5] Vega points out that the district judge agreed to strike that portion of the PSR at the start of the sentencing hearing. But, as the judge explained when delivering the sentence, it was removed only because Vega's counsel was concerned that the Bureau of Prisons would use it to "jack up his security level." The truth of the admission was not contested.

to the panel. But we agree with the panel's original view that unfair surprise has not been established. At sentencing defense counsel had ample opportunity and incentive, without any advance notice of a possible variance, to make the same arguments now offered to us.

First, Vega submits that mitigating evidence about his family circumstances could have been offered. But mitigating evidence would have been relevant to sentencing with or without a variance from the guideline range. The principal factor cited, the death of Vega's father shortly before the crime, was readily detectable by counsel and potentially useful to argue for a lower sentence within or (under *Booker*) below the guideline range.

Next, Vega contends that a carjacking that involves invading a home is no worse, for purposes of the section 3553(a) factors, than an ordinary carjacking. We fail to see how further notice was necessary in order to prepare that argument about the seriousness of the offense facts—a typical sentencing consideration. Comparing and contrasting a defendant's particular crime to its "heartland" prototype is *always* relevant. That the judge might think that a home invasion carried an extra sense of menace is hardly a surprise.

Finally, Vega says that the death threat and firing of the gun were already taken into account by the guidelines, and that with more notice, defense counsel would have been prepared to point that out. But a factor that is worked into the guideline calculus may still be considered by a district judge in the

section 3553(a) analysis. *See, e.g., United States v. Scherrer,* 444 F.3d 91, 93-94 (1st Cir. 2006) (en banc), *cert. denied,* 127 S. Ct. 927 (2007). Anyway Vega's counsel *did* emphasize—without requiring any special notice—that the enhancements provided in the guidelines were sufficient. The district judge simply did not agree.

Parts I, II, III(A), and III(C) of the panel opinion are *reinstated;* Vega's conviction and sentence are *affirmed;* and the case is *remanded* for correction of the written judgment.

It is so ordered.

TORRUELLA, Circuit Judge (Reserving and Dissenting).

The circumstances that force me to state my views at this time leave me no alternative but to partially emulate Justice Felix Frankfurter's response to similar constraints, about which he stated:

> Time is required not only for the primary task of analyzing in detail the materials on which the Court relies. It is equally required for adequate reflection upon the meaning of these materials and their bearing on the issues now before the Court. Reflection is a slow process. Wisdom, like good wine, requires maturing.
>
> Moreover, the judgments of this Court are collective judgments. They are neither solo performances nor debates between two sides,

> each of which has its mind quickly made up and then closed. The judgments of this Court presuppose full consideration and reconsideration by all of the reasoned views of each. Without adequate study there cannot be adequate reflection. Without adequate reflection there cannot be adequate deliberation and discussion. And without these, there cannot be that full interchange of minds which is indispensable to wise decision and its persuasive formulation.
>
> The circumstances being what they are, I am forced, deeply as I regret it, to reserve for a later date [the full] expression of my views.

Reia v. Covert, 351 U.S. 487, 492 (1956) (Frankfurter, J., reserving).

This solution is, of course, hardly a satisfactory one, as it would leave me, an active member of this Court, without an effective voice and vote at a crucial juncture in this proceeding—a result which affects the substantive rights of the parties to this appeal. I believe that the parties are entitled to the benefit of my views, even if they are considered to be in error by some of my colleagues.

Although I am in substantial agreement with the views expressed by Judge Lipez in his excellent dissent, I am also deeply concerned by the serious policy, procedural, and substantive issues raised by the unwarranted haste which has characterized this en banc proceeding. Accordingly, I must state my views, even if in a preliminary and incomplete

fashion.

The convocation of this particular en banc proceeding highlights the whimsical and uneven manner in which this circuit often applies the rehearing rules. Indeed, both the granting and denying of petitions for these extraordinary proceedings evince a double-standard with respect to which issues are deemed meritorious of such review. *See, e.g., Cerqueira v. American Airlines,* ··· F.3d ····, No. 07-1824, 2008 WL 541642 (1st Cir. Feb. 29, 2008) (Torruella, J., dissenting). Time constraints do not allow for an exhaustive inventory of this asseveration, but the circumstances of this present appeal demonstrate one such example.

In this case, before either the appellant or the appellee had the opportunity to seek en banc review, the court undertook a rather unusual procedure and ordered en banc rehearing *sua sponte*. The appeal thus metamorphosed into one more relevant to, and reflective of, a judicially fueled agenda. That agenda became evident in light of the Government's own change of heart: both sides now agree that Rule 32(h) applies to post-*Booker* variances. Furthermore, the issue for which the en banc court was convened is presently before the Supreme Court, *see United States v. Irizarry,* 458 F.3d 1208 (11th Cir. 2006), *cert. granted,* 128 S. Ct. 828 (2008), and will most likely be decided in a definitive way before June. At a minimum, circumstances would seem to counsel awaiting the decision of the Supreme Court rather than unnecessarily investing our limited judicial resources on this one.

In any event, I am opposed to the majority's disregard for the unequivocal language of Rule 32(h) and the clear mandate of the Supreme Court in *Burns v. United States*, 501 U.S. 129 (1991). Specifically, in *Burns*, the Court observed that the purpose of Rule 32 was to promote "focused, adversarial resolution of the legal and factual issues." *Id.* at 137. The Court recognized that in the absence of notice, parties would make arguments "in a random and wasteful way, by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative" or, worse yet, "the parties [may] not even try to anticipate such a development," and leave the contemplated grounds untested by the adversarial process. *Id.*

The majority's opinion substitutes these requirements with what is, in effect, an unauthorized rule-making amendment to Rule 32 by this court. The majority has concocted a vague standard for pre-sentence notice which will inevitably lead to interminable litigation as to what a "competent and reasonably prepared counsel" would have anticipated. Op. at 5. This will undoubtedly have the effect of causing more delay and a greater waste of judicial resources than the occasional continuance forecast by the majority's opinion were the Rule 32 standard to be followed. *See* Op. at 4-5. The fact is that such continuances might be necessary in only a handful of cases.[6] In any event, the postponement of sentencing

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[6] Of the federal post-*Booker* cases, only 1.5% of cases had sentences above the Guidelines and only 11.9% were below (53.5% of which arose in the five circuits which already require the Rule 32 notice). *See* U.S. Sentencing

is a minor inconvenience to the judicial system when weighed against the basic due process protections afforded by the Rule 32 notice requirements. *See Burns,* 501 U.S. at 138 (noting that "were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is *mandated* by the Due Process Clause" (emphasis added)). I dissent.

LIPEZ, Circuit Judge, dissenting.

I respectfully dissent from the majority's conclusion that the reasonable notice required by *Burns v. United States,* 501 U.S. 129 (1991), and Federal Rule of Criminal Procedure 32(h) is inapplicable to Guidelines variances. The majority's rejection of a reasonable notice requirement in favor of a new standard based on whether "some ground or factor . . . would unfairly surprise competent and reasonably prepared counsel" leaves district court judges without the very guidance the majority purports to offer them. Indeed, the government now also agrees that the reasonable notice required by *Burns* and Rule 32(h) must apply to Guidelines variances to ensure full adversarial testing of the issues related to sentencing.

Moreover, having further considered the issue in the context of en banc briefing and argument, I have become convinced that the reasonable notice requirement means notice of a possible variance

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Comm'n, 4th Quarter Report (2006), available at http:// www. ussc. gov/ sc_ cases/ Quarter_ Report_ 4 th_ 07. pdf.

being contemplated by the judge in *advance* of the sentencing hearing. Such prehearing notice is most consistent with Rule 32's directive that parties be given the opportunity to comment on matters "relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C). This rule does not mean that every failure to give prehearing notice will require a new proceeding. Such errors lend themselves to harmless error review. In this case, however, I cannot find that the error was harmless, and I therefore would vacate Vega's sentence and remand for a new sentencing hearing.

I.

My conclusion that notice may be deemed "reasonable" only if given in advance of the sentencing hearing is informed by multiple considerations. Most importantly, the interest at stake for the defendant—the length of incarceration—could not be more critical, even when the potential difference in a defendant's sentence would be "merely" a matter of months. Whether or not the Due Process Clause is implicated,[7] the defendant's opportunity to comment meaningfully when a court contemplates a sentence outside the Guidelines is of utmost importance.

It also is significant, as the panel opinion observed,

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[7] The Supreme Court noted in *Burns* that its construction of Rule 32 avoided "the serious question whether notice in this setting is mandated by the Due Process Clause." 501 U.S. at 138.

that implicit in *Burns* and Rule 32(h)" is the understanding that Rule 32(h) notice would serve as an alternative to the forms of *prehearing* notice expressly referenced" in the rule, i.e., the presentence report or a party's prehearing submission. *United States v. Vega-Santiago,* 519 F.3d 14, 2007 WL 3171337, at *12 (1st Cir. Oct. 31, 2007) (emphasis in original). Thus, a rule of pre-hearing notice is more consistent with the principles articulated in *Burns* and incorporated into Rule 32.[8] To require counsel to respond off-the-cuff to a previously unannounced rationale for a non-Guidelines sentence is to deny the very period of deliberation that "notice" is intended to guarantee. Even when competent counsel is familiar with all of the facts of the crime and the general principles of sentencing law, he or she may not immediately appreciate their relevance to the proposed variance from the Guidelines. *Accord United States v. Calzada-Maravillas,* 443 F.3d 1301, 1304 (10th Cir. 2006) (observing that the "key component" of the notice requirement is "notice in advance of the sentencing hearing").

In addition, a bright-line rule of prehearing notice would provide unambiguous direction to both the parties and the court, with minimal burden. We must keep in perspective the small number of cases at issue here. At the en banc oral argument, the

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[8] I am, of course, well aware that Rule 32(h) applies by its terms only to sentencing *departures.* It is the principles of *Burns,* which are reflected in Rule 32(h), that make the notice requirement equally applicable to sentencing variances.

government represented that, in most instances, departures or variances are either proposed by the Probation Department in the presentence report or requested by one of the parties. This understanding that sua sponte variances by the court occur infrequently informed the conclusion reached by the original panel, which included an experienced district court judge. It will be the exceptional occasion when a court must provide its own prehearing notice of a contemplated ground for a variance; in such instances, the court would be able to alert the parties with a brief written order. A continuance would be necessary even more rarely, when a rationale for a variance first arises at the sentencing hearing.

Moreover, requiring that notice be given as a matter of course before the hearing reduces the possibility that the court will be blind-sided by a party's last-minute attempt to secure a non-Guidelines sentence. The judge is obviously in a better position to evaluate the merits of a variance if it is proposed in advance. With a rule of advance notice, the government and defendant will have greater incentive to present all arguments for a non-Guidelines sentence in their prehearing submissions, facilitating sentencing proceedings that most fairly take into account all relevant considerations.

However, even a rule of advance notice will not eliminate some questions of reasonableness. The content of the notice and its timing in relation to the date of the hearing and the issues to be addressed are elements of reasonableness. As for content, the panel opinion pointed to the requirement in *Burns* that the

notice "specifically identify the ground on which the district court is contemplating an upward departure." 501 U.S. at 138-39. A similar requirement should apply to a contemplated variance. Any less exacting requirement would impose on the parties "the burden of guessing the particular grounds on which the court might choose to increase [or decrease] the sentence." *Vega-Santiago*, 519 F.3d at 29.

As for timing, reasonableness will depend on whether the parties were given sufficient opportunity to prepare meaningful comment on the previously unannounced ground for deviating from the Guidelines. If addressing the court's contemplated rationale would require minimal legal research or investigation of facts, a brief period of time would be adequate. But if, for example, the court announced that it might rely on mitigation evidence presented in letters submitted by multiple individuals, the parties might need time to review the submissions and conduct further investigation. In such circumstances, reasonable notice would have to be given far enough in advance of the hearing to accommodate such preparation.

Regardless of the complexity or novelty of the court's sua sponte rationale, at least some advance warning is crucial to ensure the most effective advocacy and, in turn, "the thorough adversarial testing contemplated by federal sentencing procedure," *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007). Other circuits also have explicitly adopted this view. *See, e.g., United States v. Cole*, 496 F.3d 188, 191 (2d Cir. 2007) ("[N]otice given during the course of the sentencing hearing and put

into effect less than two hours later was insufficient."); *United States v. Flanders*, 491 F.3d 1197, 1220 (10th Cir. 2007) (finding that the court's announcement on the first day of sentencing that it might impose a non-Guidelines sentence was "plainly insufficient under Rule 32(h)").

A failure to provide reasonable notice will not always require resentencing. In some cases, the reviewing court may be satisfied that lack of proper notice was harmless because it would not have placed the defendant in a position to comment more effectively on the proposed variance. Where, for example, counsel had the opportunity to provide a thoughtful response to the court's rationale for a variance *and* where the defendant on appeal offered no additional rebuttal to the court's rationale, it would be appropriate to conclude that the lack of notice was harmless. If, however, a defendant identifies plausible rebuttals to the court's rationale that could have been made if counsel had been given time to prepare, the principles of *Burns* require resentencing. Otherwise, "a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines." *Burns*, 501 U.S. at 137.

The harmless error analysis addresses many of the same considerations that were included in the panel's favorable evaluation of the reasonableness of the notice provided near the outset of the sentencing hearing in this case. However, for the reasons stated, I now conclude that the better approach is to make advance notice the rule and to engage in harmless error review when the rule is violated. As I explain in

the following section, the error in this case was not harmless.

II.

As soon as the government proposed at Vega's sentencing hearing that the court go beyond the Guidelines term of 57 to 71 months, his counsel protested that the defense should have been advised in advance "so it can be prepared to rebut these arguments." The court disagreed that notice was required, heard testimony from the victims, and explained that the crime warranted a higher sentence because, *inter alia,* it involved a home invasion with a shooting and was therefore "not a regular car jacking." Counsel unsuccessfully argued in response that the presentence report and the Guidelines recommendation took the particular facts of the crime into account. In announcing the sentence, the court referred to defendant's "invad[ing] the privacy of a home in the middle of the night," the victim's plea for mercy, and the discharge of the weapon.

In his en banc brief, Vega offers several arguments that could have been made at the sentencing hearing if counsel had received advance notice that the court was contemplating a variance based on the specific details of the offense: [9]

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[9] Although these arguments were not made to the panel, I deem it appropriate to consider them on en banc review because we specifically invited argument on the notice issue.

In response to the court's concern that the carjacking was unusual because it involved a home invasion that caused serious psychological injury to the victims, counsel could [have] challenged the veracity of the victims' claims of paralyzing fear, noting that [the victim] responded to the robbery by getting a gun, firing 13 shots at Mr. Vega-Santiago as he drove away on a public street, and then reloading and "go[ing] after the defendant" with his friend in an SUV. Counsel also could have argued that being robbed and fired upon by an armed gunman in *any* location causes serious emotional trauma, and that the marginal cost of enduring the crime at home, as opposed to numerous other private locations, does not justify a variance from the guideline range.

In response to the court's reliance on the shot fired during the robbery, counsel could have pointed out that the mandatory consecutive sentence on Count Two already reflected a three-year increase because "the firearm [was] discharged" rather than merely "brandished." *Compare* 18 U.S.C. § 924(c)(1)(A)(iii) (ten-year mandatory minimum), *with* 18 U.S.C. § 924(c)(1)(A)(ii) (seven-year mandatory minimum).

In response to the court's reliance on the death threat and pleas for mercy, counsel could have explained the effect of the guideline adjustment for death threats, U.S.S.G. § 2B3.1(b)(2)(F), which was applied in this case, and could have reminded the court of "the need to avoid unwarranted sentence disparities among defendants with

> similar records who have been found guilty of similar conduct,"18 U.S.C. § 3553(a)(6).

Appellant's En Banc Brief at 21-22 (citations omitted).

These arguments, which directly challenge the need for a non-Guidelines sentence to meet the court's objectives, are neither frivolous nor tangential to the court's reasoning. We cannot know their impact on the court if counsel had the opportunity to present them at the sentencing hearing. The court expressed concern that Vega's sentence "reflect how serious this offense was." Although defense counsel argued at the hearing that the Guidelines sentencing range would accomplish that purpose, the brief adds specific content, supported by authority, to the more general argument that the Guidelines already accounted for the facts that bothered the judge. It is precisely this sort of developed presentation by counsel, reinforced by legal and factual references, that is denied a defendant who is not given advance notice of the court's contemplated grounds for a non-Guidelines sentence. Moreover, in its explanation for the sentence, the court also referred to Vega's admission that he had "previous brushes with the law which included violent crime allegations for which he was not convicted"—a basis for deviating that the court had not previously mentioned and for which, therefore, no notice was provided.

Where, as here, a defendant demonstrates that lack of notice deprived him of "full adversary testing of the issues relevant" to his sentence, *Burns*, 501 U.S.

at 135, the error cannot be deemed harmless and a remand for resentencing is necessary.

III.

The majority predicts that "a mechanical notice rule" would cause undesirable consequences. In their view, it would cause judges to "shy away from imposing non-guideline sentences that the parties had not proposed in advance," or, alternatively, "the judge would often have to employ a burdensome two-stage regime." Neither of these assertions has merit.

A. Multiple Proceedings

The majority's concern that an advance notice rule would often require a two-stage sentencing process reveals a fundamental misunderstanding of the sentencing process. My colleagues appear to believe that a judge enters the courtroom for a sentencing hearing with little sense of the sentence he or she intends to impose or the factors that will affect that sentence. They assume that these factors will become apparent only during the course of the hearing and that, if notice is required for a decision to deviate from the Guidelines, many variances will require a continuance and second hearing.

That concern is at odds with reality. While the majority may be correct that a judge will not make a final sentencing decision until the end of the hearing, and "may well be revising his views depending on what is presented and how counsel respond to questions," the judge will arrive at that hearing after

a review of the presentence report and other relevant materials. He or she will already have a developed view of what the appropriate sentence is, including its length. To be sure, the judge's views may be altered by what he or she hears at the hearing. But a judge will almost always have considered in advance of the hearing whether an upward or downward variance is appropriate. To suggest less forethought on the part of the sentencing judge is to suggest that the judge enters the hearing unprepared.

In other words, the ultimate decision to deviate from the Guidelines—made at the conclusion of the sentencing hearing, after adversary testing of the issues—should not be confused with the earlier inclination—developed before the hearing—to focus attention on particular factors that might warrant such a deviation. The notice required by Rule 32(h) is not that a court *will* impose a variance, but only that it is considering factors that *may* justify a variance. Hence, it would pose no burden for the court to provide notice in advance of the hearing that such a variance is contemplated. In those few instances where the court's inclination to impose a variance is based on a factor or factors raised for the first time at the hearing, the principles of *Burns* and Rule 32(h) require the court to provide sufficient notice to enable both the defendant and the government to consider, research and thoughtfully respond to the new ground. In that case a continuance of the sentencing hearing would be required. Such continuances would be a small price to pay for the fairness to all parties of the advance notice requirement.

B. The Role of the Guidelines

The notion that a rule of advance notice would inappropriately incline judges toward the Guidelines is also seriously flawed. In multiple cases this term, the Supreme Court has explicitly confirmed that the Guidelines remain a central part of the sentencing process post-*Booker*. The Guidelines are "the starting point and the initial benchmark" for sentencing decisions, *Gall v. United States*, 128 S. Ct. 586, 596 (2007), entitled to "respectful consideration," *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007), because "in the ordinary case, the [Sentencing] Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives,'" *id.* at 574 (quoting *Rita*, 127 S. Ct. at 2465). *See also United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (holding that the district court normally should begin with a Guidelines calculation).

The majority does not dispute the continuing centrality of the Guidelines to the sentencing process. Indeed, they acknowledge the Guidelines' "gravitational pull." They worry, however, that an advance notice requirement will increase the Guidelines' pull on district court judges and hence could compromise the changes in the sentencing process effected by the Supreme Court in *Booker* and its progeny. The suggestion that district court judges would shy away from sua sponte variances as a matter of convenience is misguided. It is inconceivable to me that, having given the Guidelines due consideration and finding them lacking, a judge

would suppress the independent judgment required by the Supreme Court simply to avoid providing the parties with reasonable prehearing notice. The modest burden of preparing a brief notice or, in the rare case, continuing an already convened sentencing hearing to a later date would not deter a judge from imposing a variance.

Rather than justifying less notice, the broader sentencing discretion afforded to district judges post-*Booker* requires that defendants be given the same advance warning of the court's contemplated rationale for deviating from the Guidelines that *Burns* required for sentencing departures. As the panel opinion observed, the need for notice remains acute because of the virtually limitless number of factors that may be used to support a variance. Although notice under Rule 32 is owed to both the defendant and the government, the defendant's interest in preparing the most persuasive argument available against an upward variance is obviously of particular significance. Defendants should not be placed in the untenable position of "trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative" or risk allowing "a critical sentencing determination [to] go untested by the adversarial process." *Burns*, 501 U.S. at 137.

The majority acknowledges that there are some cases where, as a matter of fairness, notice must be provided. But the majority's proposed approach—providing notice or granting a continuance when the court proposes to rely on a ground that would "unfairly surprise competent and

reasonably prepared counsel"—has at least three serious flaws. First, it gives no guidance at all to district judges. Without an anchor in either the Due Process Clause or a bright-line rule, the majority's standard offers sentencing judges no framework within which to evaluate the need for notice. Fairness, surprise and reasonable preparation are all elusive concepts that individual judges will see differently.

Second, the ambiguity of the standard leaves every non-Guidelines sentence that was imposed without notice open to challenge on appeal. Surprise arguably exists any time the court announces, for the first time at the sentencing hearing, its sua sponte intention to deviate from the Guidelines, and surprise will rarely be deemed "fair" by a defendant who has a right, under Rule 32, to comment on matters affecting the length of his incarceration. *See* Fed. R. Crim. P. 32(i)(1)(C). Debate over what it means for counsel to be "reasonably prepared" for a sentencing hearing surely will consume more judicial time than judges would expend in giving prehearing notice. Moreover, the standard is so vague that appellate courts could rarely, if ever, conclude that the sentencing court had erred.

Third, the majority suggests that most cases would not involve unfair surprise because courts typically would base variances on "[g]arden variety considerations" such as the likelihood of recidivism or the seriousness of the crime. But the commonality of such factors is not the issue. What matters is how the court is processing all of the information relevant to those factors and its inclination to take an exceptional view of them. In the absence of advance

notice, neither the defendant nor the government has reason to anticipate that the usual factors may lead to a non-Guidelines sentence, and advocating for a lower sentence or higher sentence within a Guidelines range is not the same as advocating against the court's inclination to sentence outside the Guidelines. That difference is reflected in the new arguments asserted in Vega's en banc brief, which specifically emphasize why the court's concerns did not require a sentence beyond the Guidelines.

In sum, an easily administered bright-line rule requiring advance notice in all cases would promote both actual fairness in sentencing and "the perception of fair sentencing," *Gall,* 128 S. Ct. at 597, without undue burdens on the courts. The Supreme Court already has recognized the need for a reasonable notice requirement in the context of departures. In the post-*Booker* era, when the court has broader discretion to go outside the Guidelines, notice remains a critical component of the defendant's right to meaningfully comment on the appropriateness of a non-Guidelines sentence. I therefore respectfully dissent.

APPENDIX B
COURT OF APPEALS PANEL OPINION

United States Court of Appeals
For the First Circuit

UNITED STATES OF AMERICA
Plaintiff, Appellee,
v.
MANUEL A. VEGA-SANTIAGO
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. José A. Fusté, U.S. District Judge]

No. 06-1558

Before TORRUELLA and LIPEZ, Circuit Judges, and DICLERICO, JR., [FN*] Senior District Judge.

FN* Of the District of New Hampshire, sitting by designation.

October 31, 2007

LIPEZ, Circuit Judge.

In 2005, a federal jury convicted Manuel Vega-Santiago ("Vega") of armed carjacking and related weapons charges. The district court imposed two consecutive ten-year sentences. On appeal, Vega contests his conviction on multiple grounds: the victims' identification of him was tainted and improperly admitted; the court erred in allowing testimony concerning his confession, which he claims was involuntarily given; the district court abused its discretion in reopening the case to allow the government to introduce additional evidence after he moved for a judgment of acquittal; and the evidence presented at his trial was insufficient to establish all elements of the charged offenses. We find no merit in any of these claims.

Vega also challenges his sentence, arguing that it is unreasonable and that he was not given proper notice of the court's intent to impose a sentence above the Sentencing Guidelines' range. This latter contention requires us to address an issue that has divided the circuits—whether the requirement in Federal Rule of Criminal Procedure 32(h) that a court give the parties "reasonable notice" of a contemplated departure from the Sentencing Guidelines applies post-*Booker* when a court is considering a sentence that varies from the Guidelines.

We conclude that Rule 32(h) applies to post-*Booker* variances, as well as to Guidelines departures. We also conclude that, in the circumstances of this case, the notice and the term of imprisonment were both reasonable. Thus, although we must remand for correction of the written

judgment, which records an inaccurate sentence on one charge, we otherwise affirm the conviction and sentence.

I.

On the evening of September 6, 2005 Javier García-Toledo ("García") and Pedro Alarcón-Carrasquillo ("Alarcón") were confronted by an armed intruder in García's kitchen. The intruder—wearing black gloves, a black jacket, a black cap and a white shirt, and carrying a black bag of the style used to carry motorcycle helmets—brandished a gun and ordered the men to surrender their money and jewelry. Threatening to kill them, the intruder then demanded that García bring him the contents of his bedroom safe. While making these threats and demands, the intruder fired his gun in close proximity to the men. García initially believed he had been shot; however, the bullet missed him and lodged in the wall behind him. Shortly thereafter, García retrieved several pieces of jewelry from the safe but left his own firearm there, and he returned to the kitchen with the items.

Upon García's return, the intruder took the jewelry and asked whether García's car, a red Nissan 350Z, had a special alarm system. Ascertaining that it did not, the intruder demanded that García start the vehicle. The intruder then directed the men to the bedroom. Shortly thereafter, García and Alarcón heard the sound of the car's engine moving away from the house.

Confident that the intruder was leaving, García retrieved his pistol from the bedroom safe and the men pursued the intruder, firing at the car as it backed down the driveway. Using Alarcón's truck, the men pursued the intruder through the streets. Meanwhile, they called 911 to report the robbery. Happening upon a patrol car at a nearby convenience store, the men stopped to explain the situation to the police. At the officers' suggestion, García surrendered his weapon.

While the men were speaking with the police, the officers received the news that a vehicle matching the description of García's Nissan had been found. García and Alarcón drove to the scene, followed by the police officers. As they approached the site where the car was abandoned, the men saw a group of officers interviewing someone; both men spontaneously identified that person, appellant Vega, as the intruder. A search of the vicinity uncovered a black motorcycle bag containing black gloves, a baseball cap, a black mask, a black shirt, and a .357-revolver with its serial number defaced and one bullet expended. The stolen items were also discovered nearby. Six .357-caliber bullets in a speed-loader were recovered from Vega's pocket; the bullets were of the same make as the bullets found in the revolver.

Vega was arrested on the spot by local police and subsequently was transferred to federal custody. On September 21, 2005, a grand jury returned a three-count indictment charging him with: (1) an armed carjacking, with intent to cause death or serious injury, in violation of 18 U.S.C. § 2119(1); (2) the use and possession of a firearm during and in

relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); and (3) knowing possession of a firearm with an altered or obliterated serial number, in violation of 18 U.S.C. § 922(k). Vega pled not guilty on all counts.

Vega's trial commenced on November 8 and both sides completed their presentation of evidence that day. After the government rested, defense counsel filed a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, claiming that the prosecution had not adduced sufficient evidence from which a reasonable jury could conclude that Vega had committed the crime of carjacking. In particular, the defense asserted that the prosecution had not provided substantial evidence of the car's movement in interstate commerce, a jurisdictional requirement under 18 U.S.C. § 2119. The district court allowed the government to re-open its case the next morning for the narrow purpose of presenting testimony regarding where the car was manufactured. After that testimony, both sides delivered their closing arguments. That same day, the jury found Vega guilty on all counts.

The Presentence Investigation Report ("PSR") prepared in advance of the sentencing hearing noted that the second count, charging use of a firearm during the carjacking, carried a mandatory minimum ten-year sentence, to be imposed consecutively to any other term of imprisonment. Although the carjacking offense carried a maximum statutory penalty of fifteen years' imprisonment, Vega's offense level and criminal history produced an advisory Guidelines range of 57 to 71 months. The PSR included a victim

impact statement in which both García and Alarcón expressed their desire that Vega receive the maximum sentence authorized by law. The victims emphasized that they were confronted in García's home, that they were forced to beg for their lives, that Vega showed little respect for their lives when he fired his gun so close to them that the gunpowder burned García's face, and that the event had caused both men continuing anxiety. The PSR noted that the probation officer had not "identified any information that would warrant a departure from the guidelines." Neither party objected to the PSR.

Shortly after the start of Vega's sentencing hearing, his counsel noted that Count Two—the § 924(c) firearms charge—required a ten-year term imposed consecutively to any other term of imprisonment resulting from the charged criminal activity, and he urged the court to impose a sentence at the bottom of the Guidelines range for the remaining offenses. In response, the government pointed out that ten years was the statutory *minimum* for the § 924(c) charge and the court could go above it. Defense counsel, in turn, observed that the Guidelines provided for a ten-year consecutive sentence and that, if the government believed a higher sentence was warranted, it was required to give defendant advance notice. Counsel also argued that the court was obliged to give notice if it intended to go beyond the advisory Guidelines term, specifically invoking Federal Rule of Criminal Procedure 32(h).[1]

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[1] Rule 32(h) provides:

The court rejected the notice argument, explaining its view that Rule 32(h) applies only to formal "departures," which are based on specific provisions of the advisory Guidelines, and not to "variances" from the Guidelines based on the sentencing criteria set out in 18 U.S.C. § 3553(a).[2] After additional colloquy about the adequacy of the Guidelines range in this case, including a statement from Alarcón reiterating the request that Vega receive "the greatest term possible," the court

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> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

The distinction between departures and variances was a result of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which made the Sentencing Guidelines advisory rather than mandatory. Post-*Booker*, we review sentences for reasonableness based on various factors set out in 18 U.S.C. § 3553(a). The Guidelines nonetheless remain a starting point in sentencing, and courts may still justify sentences outside the recommended Guidelines range by reference to Guidelines "departure" provisions. When a court imposes a sentence outside the Guidelines range based on its assessment of the section 3553(a) factors—without regard to specific Guidelines departure provisions—the deviation is considered a variance.

imposed a total sentence of twenty years: the ten-year mandatory minimum on the § 924(c) count (Count Two); an additional ten-year sentence on the carjacking count (Count One); and a sixty-month sentence for possessing a weapon with an obliterated serial number (Count Three), to be served concurrently with the carjacking term. The court explained that this variance from the Guidelines resulted from consideration of two of the factors listed in § 3553(a): the nature and circumstances of the offense and Vega's background. The court additionally ordered three years of supervised release. This appeal followed.

II.

A. Pretrial Identification

Vega contends that the circumstances under which the victims identified him as the perpetrator were so impermissibly suggestive as to taint the victims' subsequent identification testimony at trial, thereby denying him due process of law. *See, e.g., Neil v. Biggers,* 409 U.S. 188, 198 (1972) (explaining that "[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous"). In particular, Vega claims that any identification by the victims should have occurred through a formal line-up including other individuals rather than at the site where the car was recovered, with Vega surrounded by police officers. However, Vega filed no pretrial motion requesting suppression of the

identification, as required by Federal Rule of Criminal Procedure 12(b)(3).[3] Section 12(e) of the Rule states that the failure to file such a motion constitutes a waiver, absent a showing of good cause. Vega asserts no cause that might justify such relief; we consider this issue waived. *United States v. Torres,* 162 F.3d 6, 11 (1st Cir. 1998); *United States v. Gomez-Benabe,* 985 F.2d 607, 612 (1st Cir. 1993).

B. Voluntariness of Vega's Confession

Vega argues that the district court erred in admitting his confession into evidence, in violation of his Fifth Amendment right against self-incrimination, because the confession was not voluntarily given. *See Miranda v. Arizona,* 384 U.S. 436, 476. He also claims that his Sixth Amendment right to representation was violated because the confession occurred after the commencement of prosecution. *See Texas v. Cobb,* 532 U.S. 162, 167-68 (2001). The government counters that Vega was read his rights repeatedly, and knowingly and voluntarily chose to waive them.

In reviewing a district court's denial of a motion to suppress, we review its factual findings for clear error and its "ultimate Fourth Amendment conclusions de novo." *United States v. Paradis,* 351 F.3d 21, 24 (1st Cir. 2003) (citing *Ornelas v. United States,* 517 U.S. 690, 699 (1996)); *see also United States v. Materas,* 483 F.3d 27, 32 (1st Cir. 2007). We reverse only if no reasonable view of the evidence supports the district

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[3] Rule 12(b)(3) identifies motions that "must be raised before trial" and includes motions to suppress evidence.

court's decision. *Materas*, 483 F.3d at 32. We find no error in the district court's determination that Vega voluntarily waived his rights.

During Vega's trial, the district court conducted a suppression hearing to determine the admissibility of his confession. The officer who detained Vega testified that he read the *Miranda* warnings at the scene where the car was recovered. At that time, Vega refused to sign a waiver card and did not request an attorney. The police officer who took Vega into custody testified that, when given an opportunity to make a phone call, Vega called "a client . . . whose car he fixes," rather than an attorney. The FBI agent who interrogated Vega on June 7 testified that he read Vega his rights and that Vega signed a form acknowledging that he understood and agreed to waive his rights. The FBI agent testified that, after signing this form, Vega confessed to the robbery.

At the same suppression hearing, Vega testified that he had never been read his rights, that he repeatedly asked for an attorney, and that the officer who took him into custody "put the [speed-loader] in his hand and he struck me."[4] On cross-examination, Vega admitted that the FBI agent who interrogated

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[4] When asked if "the fact that you were struck in the face while you were in police custody[ ] play[ed] any part into [sic] your decision to answer [the FBI agent's] questions," Vega responded: "Well, I don't know. It seemed like they were harassing me. They had already hit me in the face." Vega also acknowledged that the police officer who allegedly hit him was not present during his interrogation.

him never threatened him or struck him. The following colloquy regarding Vega's waiver ensued:

> Prosecutor: Isn't it [ ] a fact that you were requested to read that document by yourself?
>
> Vega: Yes, I read it. I read it from this point to this point. . . . That is where I read it to.
>
> Prosecutor: You did understand that you had a right to an attorney; isn't that right?
>
> Vega: Yes.
>
> Prosecutor: And you were also told and you read that you had a right to remain silent?
>
> Vega: Yes.
>
> * * *
>
> Prosecutor: And you were told that you had a right to consult with an attorney and to seek his advice, didn't you?
>
> Vega: Nope.
>
> Prosecutor: Didn't you read it?
>
> Vega: Well, it says there, but they didn't give me the opportunity to have the lawyer there with me.
>
> Prosecutor: No. My question is did you read that and if you did, did you understand what it said?

Vega: Yes.

Prosecutor: And you also understood . . . that if you were asked questions and you decided to answer them, that at some point if you didn't want to go on, you could quit and nothing would happen. . . .

Vega: I don't remember that.

Prosecutor: Isn't it a fact that there came a point in time when you were asked to answer who was the person accompanying you for this robbery and you decided not to answer any more questions.

Vega: I don't remember.

At the conclusion of the suppression hearing, the court found Vega "extremely evasive," and it gave him "no credibility on the issue of his voluntariness." Our review of a district court's credibility ruling is highly deferential, *United States v. Ivery*, 427 F.3d 69, 72 (1st Cir. 2005), and we find no basis for second-guessing the court's assessment of Vega's behavior. Its credibility determination was supported by the signed waiver and by the testimony of the two police officers and the FBI agent that they had read Vega his rights. We thus find no error in the court's ultimate conclusion that Vega's confession was voluntary and, therefore, admissible.

C. Reopening of the Evidence

Vega claims that the district court erred when it allowed the government to introduce additional

evidence on a jurisdictional element of the carjacking offense after the government rested its case and Vega moved for a judgment of acquittal. We review the district court's decision to reopen after the close of evidence for abuse of discretion. *United States v. Santana,* 175 F.3d 57, 64 (1st Cir. 1999) (noting that review is for abuse of discretion even when the court "reopens the case on its own initiative, rather than on the motion of one of the parties"); *United States v. Pandozzi,* 878 F.2d 1526, 1534 (1st Cir. 1989) (finding no abuse of discretion where court allowed government to reopen). In evaluating the court's exercise of its discretion, we consider whether the value of the additional evidence outweighed the potential for disruption or prejudice in the proceedings, and if so, whether the government had a reasonable excuse for failing to present the testimony during its case-in-chief. *See United States v. Peterson,* 233 F.3d 101, 106 (1st Cir. 2000).

Here the court agreed to reopen the case to allow the government to present evidence that García's Nissan 350Z was not manufactured in Puerto Rico. To establish the crime of carjacking, the government must prove that the vehicle in question "has been transported, shipped, or received in interstate or foreign commerce," 18 U.S.C. § 2119. Vega contended that the government had not introduced any such evidence and persisted in his request for a judgment of acquittal on this basis even though the court indicated that it might take judicial notice of the fact that no automobiles are manufactured on the island of Puerto Rico (meaning that all vehicles on the island must have traveled in interstate commerce). The court repeatedly asked Vega if he wanted to

insist on evidence related to this element, and his counsel replied in the affirmative, stating: "Your Honor, I am taking whatever issues I can find." The government suggested that García's testimony that he believed the car was manufactured in "Japan or China, I don't know," might be sufficient, but was unsure. The court then reopened for the limited purpose of allowing testimony as to the car's place of manufacture.

We find no abuse of discretion in the court's decision to reopen the case. The particular evidence presented was testimony by an FBI agent who had secured a document from the internet showing that the vehicle had not been manufactured in Puerto Rico and thus had moved in interstate commerce. The document had been provided in discovery to Vega before his trial began, and Vega articulates no way in which its admission either disrupted or prejudiced the proceedings. *See United States v. Rouse*, 111 F.3d 561, 573 (8th Cir. 1997) (finding no abuse of discretion where the trial court allowed the government to reopen its case to establish a jurisdictional fact that was not a surprise to defendants); *United States v. Alderete*, 614 F.2d 726, 727 (10th Cir. 1980) (same). Although the government did not provide a compelling explanation for its failure to introduce the interstate commerce evidence in its primary case, the court explained:

> I have a responsibility, I think, if it were intent, if it were something that he acted knowingly, willfully, if it were a major element of the offense, you would have walked out of here with a Rule 29, without a question.

> But an issue like that, when everybody knows that a Nissan is not manufactured in Puerto Rico, that I could take judicial notice of that? [The government] should have presented the evidence. I am not excusing you for not doing it. He is an experienced prosecutor, and he had all the obligation in the world to do it, and he did not.
>
> But I do think I have a major obligation to do the right thing, and the right thing is to reopen.

Thus, the court recognized that the government should have presented the evidence earlier, but found beyond dispute that the car was manufactured outside Puerto Rico. It also weighed the evidence's probativeness against the potential prejudice, which it rightly viewed as low, and decided to admit the evidence. We easily conclude that the court did not abuse its discretion with its reopening decision.

D. Sufficiency of the Evidence

Vega argues that the government did not meet its burden of providing sufficient evidence from which a reasonable jury could find that he committed the carjacking. In particular, he claims that the government "did not present a single piece of physical evidence" to corroborate the victims' identification of appellant at trial.

We review challenges to the sufficiency of the evidence de novo, evaluating the evidence in the light

most favorable to the prosecution and drawing all reasonable evidentiary and credibility inferences in favor of the verdict. *United States v. Beltrán,* 503 F.3d 1, 2 (1st Cir. 2007). If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the conviction stands. *Id.*; *United States v. Grace,* 367 F.3d 29, 34 (1st Cir. 2004).[5]

Vega's challenge fails to undermine the jury's verdict. First, as he conceded at oral argument, physical evidence is not a prerequisite to a finding of guilt. *See, e.g., United States v. Peña-Lora,* 225 F.3d 17, 23-24 (1st Cir. 2000) (explaining that the uncorroborated testimony of an accomplice is a sufficient basis on which the court may uphold a conviction). Indeed, it is likely that the victims' identification of Vega as the perpetrator and his confession would be sufficient to sustain his conviction. *See United States v. Lebrón-Cepeda,* 324 F.3d 52, 58 (1st Cir. 2003) (suggesting that victim testimony was sufficient to dispel any doubts arising from defendant's conflicting confessions).

However, the government also presented substantial physical evidence that provided circumstantial corroboration of Vega's involvement in

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[5] The government urges us to consider this issue waived because Vega has not presented a developed argument contesting the elements of the offenses on which he was convicted. Finding that Vega does not succeed on the merits of this claim, we decline to decide the waiver issue.

the crimes. For example, Vega was found near the site of the abandoned stolen car, items matching those stolen from the scene were found near him, a black motorcycle helmet bag with more ammunition and a gun were found in the vicinity, Vega matched the description the victims had given the police prior to their arrival at the scene of the stolen car, and he was carrying a speed-loader with ammunition that matched both the caliber of the gun used in the carjacking and the type of ammunition found in the gun. In short, the government presented ample evidence from which a reasonable jury could find beyond a reasonable doubt that Vega committed the carjacking.

III.

Vega also appeals his sentence on three grounds: (1) that the written judgment is inconsistent with the district court's oral pronouncement at sentencing; (2) that he was not given sufficient notice of a variance from the Guidelines range as required by Federal Rule of Criminal Procedure 32(h), U.S.S.G. § 6A1.4, and Local Rule 132(b)(4);[6] and (3) that the sentence itself was unreasonable.

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[6] Guidelines § 6A1.4 contains language virtually identical to Federal Rule of Criminal Procedure 32(h). Puerto Rico Local Rule 132(b)(4) requires that parties seeking a sentence departure or adjustment "submit a written motion, specifying the grounds and legal authority in support of said request for departure and/or adjustment . . . no later than ten (10) days prior to the scheduled sentencing hearing. . . ."

A. Disparity Between the Sentence Delivered Orally and By Order

Vega urges us to remand for a correction of his sentence on the gun possession charge. Although the PSR stated that the statutory maximum term for a violation of 18 U.S.C. § 922(k) is sixty months, and the court stated at the sentencing hearing that it was imposing a sixty-month term of imprisonment, the written judgment assigns a sentence of 120 months for that offense. Where the oral pronouncement of sentence differs from the written judgment, this court has generally recognized the former. *See United States v. Muniz,* 49 F.3d 36, 42 n. 5 (1st Cir. 1995). Moreover, given the statutory maximum, *see* 18 U.S.C. 924(a)(1)(B), the court was limited to imposing a sixty-month term on this count. The government agrees that the written order is in error. We therefore remand to the district court to conform the written judgment to the court's oral pronouncement.

B. Notice of Deviation From the Guidelines

1. Notice requirement

As described above, in sentencing Vega on the carjacking charge, the district court went outside the recommended Guidelines range of 57 to 71 months and imposed a ten-year term of imprisonment-more than a four-year increase above the high end of the range. The court recognized its responsibility to consider the factors set forth in 18 U.S.C. § 3553(a),[7]

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[7] These factors include: the nature and circumstances of the offense and the history and characteristics of the

and it primarily justified the sentence based on the particularly egregious circumstances of the crime:

> This is not a regular car jacking. We are not talking about an individual who is sitting [at] a traffic light in the middle of town and someone just opens the door and takes his car. Take a look at what happened here. This man—These two persons were sharing socially in the privacy of the home of one of them. And look what happened. Somebody erupts into the house with a gun in hand. We know what happened. . . . The car jacking is secondary to the main event that almost caused the life of one or . . . two of these people.
>
> We are talking about a home invasion. It is more than a burglary. It is more than a robbery, a home robbery. It is unbelievable. And it results in a car jacking and the shooting inside the house for no reason whatsoever.

The court also noted Vega's previous "brushes with the law which included violent crime allegations for which he was not convicted, for whatever reason. But that is a fact." The court concluded that, taking into account the relevant factors, "one is left with the

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defendant; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and the kinds of sentences available.

impression that the range proposed by these guidelines for the particular circumstances of this case is not enough to meet the necessary criteria to reflect how serious this offense was and how just punishment should be provided."

Vega argues that this non-Guidelines sentence was impermissible because the district court failed to comply with Federal Rule of Criminal Procedure 32(h), which requires a sentencing court to give the parties reasonable notice that it is considering a departure from the Guidelines as well as the specific grounds for that departure. *See supra* note 1. The rule codified the Supreme Court's holding in *Burns v. United States*, 501 U.S. 129 (1991), that such notice is necessary to ensure "full adversary testing of the issues relevant to a Guidelines sentence," *id.* at 135. The Court explained that, "[b]ecause the Guidelines place essentially no limit on the number of potential factors that may warrant a departure, no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way." *Id.* at 136-37 (internal citation omitted). Thus, without notice,

> parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative. At worst, and more likely, the parties will not even try to anticipate such a development; where neither the presentence report nor the attorney for the Government has suggested a ground for upward departure, defense counsel

> might be reluctant to suggest such a possibility to the district court, even for the purpose of rebutting it. In every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process contemplated by Rule 32 and the Guidelines.

Id. at 137.

The language in *Burns,* like the language of Rule 32, applies specifically to Guidelines *departures* because, at the time the Supreme Court articulated the notice requirement, the only type of non-Guidelines sentence available was one based on the rationales for departure sanctioned by the Guidelines. *See, e.g.,* §§ 4A1.3, 5K1.1-2.23.[8] The shift

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[8] Section 4A1.3 allows upward departures, inter alia, "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history." Section 5 specifies various possible grounds for departure, including when a defendant provides substantial assistance to authorities, § 5K1.1, when an offender characteristic not typically furnishing a basis for a departure "is present to an exceptional degree," § 5K2.0(a)(4), and "[i]f significant physical injury resulted," § 5K2.2. The Guidelines' Chapter 1 introduction states that the grounds for departure listed in the Guidelines are "not exhaustive" and "that there may be other grounds for departure that are not mentioned." U.S.S.G. Ch. 1, Pt. A, intro. comment. 4(b). However, the Sentencing Commission anticipated that such cases would be "highly unusual." *Id.*

from a mandatory to an advisory Guidelines scheme post-*Booker*, and the corresponding addition of "variances" to sentencing parlance, has generated a debate among the circuits as to "whether and to what extent" Rule 32(h) and the rationale of *Burns* retain force. *See United States v. Wallace*, 461 F.3d 15, 44 n. 14 (1st Cir. 2006). Our court has not explicitly ruled on the question, although we observed in *Wallace* that "it is clearly the better practice—whether or not the legal requirement survives *Booker*—for the court to provide notice to defendants when relying on departure provisions in the advisory Guidelines not previously identified in the PSR or in a party's pre-hearing submission." *Id.*

It appears that only the Seventh Circuit has held that Rule 32 no longer requires notice even for *departures*, having concluded that, after *Booker*, "the concept of departures [is] 'obsolete' and 'beside the point.'" *United States v. Walker*, 447 F.3d 999, 1006 (7th Cir. 2006). Rule 32(h) remains in effect, however, and the government has in other cases accepted its continuing applicability. *See, e.g., United States v. Blatstein*, 482 F.3d 725, 731 (4th Cir. 2007) (finding plain error in favor of government where government argued that "sentencing court erred in imposing a variance sentence without providing reasonable notice of its intent to do so"); *United States v. Anati*, 457 F.3d 233, 236 n. 1 (2d Cir. 2006);[9] *United States v.*

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[9] In *Anati*, the court noted that the government had "indicated its agreement with Anati's position that the District Court was required to give notice prior to imposing a non-Guidelines sentence." 457 F.3d at 236 n. 1.

Vampire Nation, 451 F.3d 189, 195 (3d Cir. 2006).[10] The remaining nine circuits that have thus far addressed the issue have considered whether Rule 32(h) extends to sentencing variances, as well as departures, and they have split five to four. The Third, Fifth, Eighth and Eleventh circuits hold that the Rule is limited to departures;[11] the Second, Fourth, Sixth,

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That concession does not appear limited to departures, as distinguished from variances.

[10] Although the defendant *Vampire Nation* conceded at oral argument that Rule 32(h) did not apply because the sentence at issue was a variance rather than a departure, the government "took the position that district courts should provide advance notice of their intent to vary from a Guidelines sentencing range, regardless of whether that variance is upward or downward." 451 F.3d at 195. Interestingly, in *Walker*, the government filed a letter after oral argument, *see* Fed. R. App. P. 28(j), seeking "to withdraw its argument concerning the inapplicability of Rule 32(h) to out-of-Guidelines sentences post-*Booker*" because it was contrary to Department of Justice policy. *Walker*, 447 F.3d at 1007 n. 7. Department policy at that time recognized that "'due process concerns may still require a district court to provide notice and opportunity to be heard on any contemplated departure or imposition of a non-Guideline sentence,'" *Id.* (quoting 28(j) letter).

[11] *See United States v. Vampire Nation*, 451 F.3d 189, 195 (3d Cir. 2006); *United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), *petition for cert. filed*, 75 U.S.L.W. 3585 (U.S. April 18, 2007) (No. 06-1381); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (Oct. 26, 2006).

Ninth and Tenth hold that it is not, and have applied the notice requirement to variances as well as departures.[12] For the reasons we elaborate below, we think the better view is that the notice requirement survives *Booker* and applies to any non-Guidelines sentence—whether imposed as a departure or as a variance.

The circuits that have concluded otherwise rely most heavily on the rationale that the element of unfair surprise that underlay *Burns* and Rule 32(h) is no longer present because defendants are on notice post-*Booker* that sentencing courts have discretion to consider any of the factors specified in § 3553(a). *See, e.g., United States v. Mejia-Huerta*, 480 F.3d 713, 722 (5th Cir. 2007), *petition for cert. filed*, 75 U.S.L.W. 3585 (U.S. April 18, 2007) (No. 06-1381) ("This is not an instance when the sentencing court unexpectedly departed from a binding Guidelines range. Rather, the district court predictably did what any district court is empowered to do post-*Booker*."); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (Oct. 26, 2006) (similar); *Vampire Nation*, 451 F.3d at 196 ("Because defendants are aware that district courts will consider the factors set forth in § 3553(a), we believe the element of 'unfair surprise' that *Burns* sought to eliminate is not present.").

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[12] *See United States v. Anati*, 457 F.3d 233, 237 (2d Cir. 2006); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006); *United States v. Evans-Martinez*, 448 F.3d 1163, 1164 (9th Cir. 2006); *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007).

We find this distinction based on lack of surprise unpersuasive. Like the other circuits that have found the Rule 32(h) notice requirement equally applicable to all non-Guidelines sentences, we fail to see how the concern for unfair surprise underlying the Supreme Court's decision in *Burns* is alleviated in the context of post-*Booker* variances. The Tenth Circuit has aptly noted the equivalence of the two settings: "Defendants are, indeed, constructively 'on notice' of § 3553(a) factors post-*Booker*. Under the previous sentencing regime, however, they were equally aware of the specific circumstances for departure under the Guidelines." *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007); *see also, e.g., United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006) ("We cannot discern any distinction between the departure criteria and the § 3553(a) factors, in terms of the notice that they provide to parties preparing for sentencing.").[13]

Moreover, general knowledge of the § 3553(a) factors will not eliminate the Court's core concern in *Burns*—that parties have the opportunity to expose the *particular* factors under consideration to "full adversary testing." The Guidelines remain the starting point for all sentencing post-*Booker*, and a court's decision to deviate from the Guidelines range-whether up or down, by departure or

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[13] Although departures could be based on grounds not explicitly listed in the Guidelines, the Sentencing Commission, as noted *supra*, anticipated that such instances would be "highly unusual."

variance-still requires identification of distinguishing factors that warrant divergence from that baseline. *See United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006) ("[A] district court should normally begin with a guideline calculation, and . . . after considering departures, the district court should decide whether 'other factors' (beyond the guidelines) warranted an ultimate sentence above or below the guideline range." (citing *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc))). The Court in *Burns* recognized that the parties' ability to respond meaningfully to the considerations deemed important by the district court depends upon knowing what they are in advance. We fail to see how the need for notice is any less acute when the court relies on the factors identified in § 3553(a) than when it relies on the departure criteria set out in the Guidelines.

> "[N]otice of an intent to depart or vary from the guidelines remains a critical part of sentencing post-Booker," because "[t]here is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance, and neither the defendant nor the Government 'is in a position to guess when or on what grounds a district court might depart' or vary from the guidelines."

Blatstein, 482 F.3d at 732 (quoting *Davenport*, 445 F.3d at 371) (quoting *Burns*, 501 U.S. at 136-37, 111 S. Ct. 2182); *see also Anati*, 457 F.3d at 236-37.

Indeed, the Second Circuit invoked the more general subsection of Rule 32 on which the Supreme

Court based its notice requirement—32(i)(1)(C)—in the course of extending the *Burns* holding to variances.[14] *See Anati*, 457 F.3d at 236; *see also Blatstein*, 482 F.3d at 731-33 (noting the origin of Rule 32(h) and referring generally to "Rule 32 notice error"). That provision obliges a sentencing court to "allow the parties' attorneys to comment on . . . matters relating to an appropriate sentence." The Supreme Court concluded that Congress could not have intended district courts to depart from the Guidelines *sua sponte* "without first affording notice to the parties" because such a reading of Rule 32(i)(1)(C) would "render[ ] meaningless the parties' express right 'to comment upon . . . matters relating to the appropriate sentence.'" *Burns*, 501 U.S. at 136. In our view, this analysis is equally applicable to variances; thus, even without flexibly applying Rule 32(h), whose language explicitly refers to departures, the requirement to provide advance notice for variances can be anchored in Rule 32.

In sum, we join the circuits that require reasonable notice that a court is contemplating a sentence outside the Guidelines range, whether by means of departure or variance. To hold otherwise would be "inconsistent with Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues relevant to" sentencing, *id.* at 137.

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[14] When the Supreme Court decided *Burns*, the provision was numbered Rule 32(a)(1). *See Burns*, 501 U.S. at 135.

2. The Contours of Reasonable Notice

Our conclusion that Rule 32(h) applies to sentencing variances is only the first step in determining whether Vega is entitled to resentencing. The government contends that, even if notice of a contemplated variance is required under Rule 32(h), any error arising from the failure to notify in this instance was harmless. The government points out that the PSR contained statements from García and Alarcón advocating for "the greatest term possible" for Vega and that defense counsel was given an opportunity at the sentencing hearing to argue against a non-Guidelines sentence. The government further notes that Vega did not request a continuance in order to prepare a more complete response. In sum, the government's view is that Vega suffered no harm from the lack of prehearing notice of a possible departure or variance.

However, we need not reach the question of harmless error. In determining whether the district court committed any error on the notice issue, we must examine the nature and timing of the notice that is required. The Supreme Court in *Burns* explicitly left unanswered "the question of the *timing* of the reasonable notice required by Rule 32," 501 U.S. at 139 n. 6, and some discussion of the *kind* of notice that must be provided also is warranted. As we explain, our consideration of these factors leads us to conclude that, in the circumstances of this case, no error occurred.

a. Kind of Notice

As noted, the government suggests that Vega did, in fact, have notice that he could receive an above-Guidelines sentence because the victim impact statements reported in his PSR urged that he be given the maximum possible sentence. In a previous case, we rejected the government's contention that, "because the PSR contained a full recitation of the defendant's criminal conduct, this put the defendant on notice of the factors on which the court relied for the upward departure." *United States v. Mangone,* 105 F.3d 29, 35 (1st Cir. 1997). Any reference to the *victims'* unsurprising and understandable wish that a defendant be punished to the full extent of the law is no more revealing of the court's inclination toward a non-Guidelines sentence and cannot satisfy the notice requirement. *Cf. Blatstein,* 482 F.3d at 732 ("*Burns* and Rule 32(h) do not permit a court to impose a variance sentence without notice merely because the basis for the variance is mentioned somewhere in the presentence documents.").

In many cases, multiple grounds for departure or variance will be supported by the facts, and the very point of *Burns* is to free parties from the burden of guessing the particular grounds on which the court might choose to increase the sentence. When the ground for a potential departure or variance is not explicitly raised in either the PSR or other prehearing submission, the district court must otherwise provide notice that "specifically identifies] the ground on which [it] is contemplating an upward

departure." *Burns*, 501 U.S. at 138-39.[15] No reference to a possible variance was made in any pretrial submission in this case. To the contrary, the PSR stated that "[t]he probation officer has not identified any information that would warrant a departure from the guidelines." Vega therefore did not receive notice before the sentencing hearing that satisfied the requirements of Rule 32.

b. Timing

The question of timing of the notice poses the more challenging issue in this case. Rule 32(h) requires the sentencing court to give the parties "reasonable notice" that it is considering a non-Guidelines sentence. One circuit has said that this notice must be provided "not later than the outset of the sentencing hearing," *United States v. Hernandez*, 251 F.3d 1247, 1251 n. 4 (9th Cir. 2001), and another has held that "notice given during the course of the sentencing hearing and put into effect less than two hours later was insufficient," *United States v. Cole*, 496 F.3d 188, 191 (2d Cir. 2007). *See also United States v. Calzada-Maravillas*, 443 F.3d 1301, 1304 (10th Cir. 2006) (describing the "key component" of the notice requirement as "notice in advance of the

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[15] Thus, even if the PSR indicates that a departure may be warranted on a particular ground, the requirement of notice is not satisfied if the district court bases its deviation on another ground. *Atencio*, 476 F.3d at 1104 ("Rule 32(h) and *Burns* leave no doubt that the defendant has a right to know in advance the very ground upon which the district court might upwardly depart or vary.").

sentencing hearing"); *United States v. McCarthy*, 97 F.3d 1562, 1580 (8th Cir. 1996) (holding that one day of notice was sufficient where counsel responded and declined additional time).

Importantly, the Supreme Court in *Burns* refrained from explicitly commenting on the timing of "reasonable notice" because the issue was not raised. *See* 501 U.S. at 139 n. 6. Still, we conclude that the question is largely resolved by the language of *Burns* and Rule 32(h) requiring that notice be given when a court contemplates a departure "on a ground not identified for departure either in the *presentence report* or in a party's *prehearing* submission." (Emphasis added.) Implicit in this language is the understanding that Rule 32(h) notice would serve as an alternative to the forms of *prehearing* notice expressly referenced. Such notice, like the methods for which it is a substitute, should generally be provided before the hearing. Indeed, any other conclusion would place an unfair premium on how adroitly a lawyer is able to respond off-the-cuff to the district court's "surprise."

Nonetheless, we think it wise to eschew an inflexible rule because the need for prehearing notice is more compelling in some circumstances than others. If the court relies on record facts that plainly were well known to counsel, and allows counsel the opportunity to respond to its newly announced inclination to go outside the Guidelines, notice provided at or near the outset of the sentencing hearing could be reasonable. *See United States v. Patrick*, 988 F.2d 641, 647 n. 7 (6th Cir. 1993) (noting that the Supreme Court "did not even go so far as to

require notice in advance of the sentencing hearing, but rather left open the possibility that the notice requirement might be met simply by notice at the hearing"); *United States v. Absalon,* 210 F.3d 369, 2000 WL 294449, *3 (5th Cir. 2000) (table) (holding that notice was reasonably given where court recessed after notifying defendant at sentencing hearing that it was considering an upward departure, and counsel subsequently asked to proceed that day without a continuance, because defendant "had ample opportunity to prepare and present evidence in opposition to a departure"). In no circumstances, however, may a court give "reasonable notice" by offering counsel the opportunity to comment after it imposes sentence. *See Calzada-Maravillas,* 443 F.3d at 1306.

Here, Vega learned of the court's intention to sentence outside the Guidelines during the colloquy that preceded the formal sentencing, and Vega's attorney had the opportunity to respond at length to the court's view that a variance was warranted on the ground that this was an atypical carjacking, involving a home invasion. Defense counsel repeatedly urged the court to rely on the dispassionate recommendation of the Probation Department in the PSR, concluding his argument as follows:

> Now, Your Honor, like I was saying, I understand the horror and the fear this kind of thing creates. All of us are human beings. But the purpose of the guidelines is to avoid that passion which is natural, which is normal, to influence the sentencing procedure. And when

I hear him [the victim] I understand what he felt. I felt it when I was car jacked some years ago, around 20 years ago. And at the moment all I wanted was, you know, for this person to be[. . . .] I wanted revenge. And that's the feeling that one gets both as an individual and as a member of society. But sentencing should not be ruled by that passion.

I believe that the presentence report, which was done in a scientific manner, so to speak, in a technical manner takes care of the factors that occurred. And the proper sentence should be what is recommended in the presentence report, which should be the 10 years for the firing of the gun. And he gets an enhancement for the firing. It would be five years, seven years because the gun was fired. He gets 10 and it should be 57 to 71 months for the robbery car jacking itself.

The presentence report takes care of all the factors and I believe this is an appropriate sentence for what occurred. We are not talking a light sentence. We are talking about 15 years, which is a substantial amount of time. My client is 31 years now. He would be 46 years old when he comes out of jail. We are talking about society taking out a substantial part of my client's life for punishment for what he did. And that would be the summation for the defense, Your Honor.

Although defense counsel first objected to the court's failure to provide prehearing notice of its

intent to impose a non-Guidelines sentence when the court raised that possibility early in the hearing, he did not say that he was unprepared to respond to the court's rationale and did not seek a continuance. *Cf. Anati,* 457 F.3d at 235, 237 (remanding for resentencing where district court rejected defense counsel's request for a " 'brief adjournment to respond'" to *sua sponte* sentence above Guidelines range based on court's view of " 'the deleterious impact of heroin in our communities'"). Importantly, the district court relied solely on the well known facts of the crime and the obvious conclusion that this was not a classic carjacking. Even on appeal, Vega offers no argument beyond that made by counsel at the hearing to refute the court's judgment that an enhanced sentence was warranted based on the nature of the crime.

> At the heart of Rule 32's notice requirement is the principle that a defendant should be sentenced only after "focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence."

United States v. Meeker, 411 F.3d 736, 745 (6th Cir. 2005) (quoting *Burns,* 501 U.S. at 134). We are satisfied that, in the circumstances of this case, Vega received the "reasonable notice" required by *Burns* and Rule 32.[16]

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[16] In leaving the timing of reasonable notice to the lower courts, the Supreme Court observed that they might choose "to adopt appropriate procedures by local rule," *Burns,* 501 U.S. at 139 n. 6; *see United States v.*

C. Reasonableness of the Sentence

Vega's claim that his sentence is unreasonable is of necessity limited to the above-Guidelines term of imprisonment imposed on the carjacking count. This is so because Count Two, which charged use of a firearm in the carjacking, carried a mandatory minimum ten-year term, and the sixty-month concurrent term imposed on Count Three effectively was subsumed within the term imposed on the carjacking. Thus, only a modification of the carjacking sentence would be both permissible and of consequence.

Our review of a district court's sentencing decision post-*Booker* "focuses on whether the court has 'adequately explained its reasons for varying or declining to vary from the guidelines and whether the result is within reasonable limits,'" *United States v.*

Hernandez, 251 F.3d 1247, 1251 (9th Cir. 2001) ("[W]e leave to the individual districts the task of fashioning rules detailing when their courts must give notice of an intent to depart."). Puerto Rico Local Rule 132(b)(4) requires that *parties* seeking a departure or adjustment must submit a written motion at least ten days before the sentencing hearing, "specifying the grounds and legal authority in support of said request." Vega makes no developed argument about the applicability of that rule to the facts of this case, and we do not consider it, *see United States v. Hansen,* 434 F.3d 92, 105 (1st Cir. 2006), other than to note that the rule's insistence on advance notice of a requested departure or adjustment is consistent with our conclusions about the importance of prehearing notice.

Dixon, 449 F.3d 194, 204 (1st Cir. 2006) (quoting *United States v. Scherrer,* 444 F.3d 91, 93 (1st Cir. 2006) (en banc)); *see also United States v. Jiménez-Beltre,* 440 F.3d 514, 519 (1st Cir. 2006) (en banc). If the court has made no legal error and "has offered a plausible explication of its ultimate sentencing decision, we are quite respectful of that decision." *Dixon,* 449 F.3d at 204.

Vega argues that his sentence is unreasonable because it is greater than necessary to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a), which include the need "to reflect the seriousness of the offense" and "to provide just punishment for the offense." He further contends that the court failed to take into account his "extraordinary family circumstances," including his father's recent death, his own drug addiction, and the impact of the criminal proceedings on his children and other family members.

As quoted above, the district court explained at length its view that the circumstances of this case were exceptional—involving a home invasion in the middle of the night and a near—miss shooting of one of the victims. Vega does not dispute the characterization of this carjacking as unusually violent and risky. The court further pointed to Vega's admittedly violent past. Although the court did not discuss the family circumstances Vega now cites, Vega did not assert these factors at the sentencing hearing to support his request for a lenient sentence.[17] We also note that, despite its view that

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[17] Counsel asked the court to impose a sentence at the

this was an exceptionally serious crime, the court did not impose the statutory maximum term of fifteen years.

This context persuades us that no sentencing error occurred; the court offered an "entirely plausible explication of why it chose [this] sentence," *Dixon*, 449 F.3d at 205, and, particularly in light of the deferential standard of review, we have no doubt that "the sentence falls within the realm of reasonableness," *id.* at 206.

IV.

We briefly summarize our holdings:

(1) Vega waived his claim relating to the victims' pretrial identification of him as the perpetrator by failing to file a pretrial suppression motion;

(2) The district court's finding that Vega's confession was voluntary, and therefore admissible, was amply supported by the evidence presented at the suppression hearing, including Vega's signed

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low end of the Guidelines range of 57 to 71 months, stating:

> I believe 57 months will be an adequate sentence when taking into consideration that he will end up serving almost 15 years for this offense, which is adequate punishment. I don't think that 71 months for that particular offense should be imposed. And that will be it, Your Honor.

waiver and his own testimony;

(3) The court properly reopened the case to allow the government to introduce evidence of the interstate commerce element of the carjacking crime;

(4) The evidence presented at trial, including the victims' identification of Vega, his confession, and physical evidence found near the site of the abandoned stolen car, was sufficient to allow a jury to find beyond a reasonable doubt that Vega committed the carjacking;

(5) Although the case must be remanded so that the district court may conform the written sentencing judgment on the gun possession charge to the oral pronouncement of a sixty-month sentence, Vega's above-Guidelines sentence on the carjacking count was both reasonable and imposed with reasonable notice.

We therefore ***affirm*** Vega's conviction and sentence, but ***remand*** for correction of the district court's written judgment.

So ordered.